



UNITED STATES OF AMERICA  
DEPARTMENT OF TRANSPORTATION  
OFFICE OF THE SECRETARY  
WASHINGTON, D.C.

Order 2001-11-10

Issued by the Department of Transportation  
on the 20<sup>th</sup> day of November, 2001  
**SERVED:** November 20, 2001

U.S.-U.K. Alliance Case

Docket OST-2001-11029 - /

Joint Application of

AMERICAN AIRLINES, INC.

and

BRITISH AIRWAYS PLC

for approval of and antitrust  
immunity for alliance agreement

Docket OST-2001-10387 - 156

Applications of

AMERICAN AIRLINES, INC.

BRITISH AIRWAYS, PLC

for Blanket Code-Share  
Authorizations and Related  
Exemptions

Docket OST-2001-10388 - 123

**Joint Application of**

UNITED AIR LINES, INC.,  
 BRITISH MIDLAND  
 AIRWAYS LIMITED,  
 AUSTRIAN AIRLINES,  
 ÖSTERREICHISCHE  
 LUFTVERKEHRS AG, LAUDA  
 AIR LUFTFAHRT AG,  
 DEUTSCHE LUFTHANSA,  
 A.G., AND SCANDINAVIAN  
 AIRLINES SYSTEM

for Approval of and Antitrust  
 Immunity for an Alliance Agreement  
 under 49 U.S.C. §§ 41308 and 41309

Docket OST-2001-10575 - /'9

**Joint Application of**

UNITED AIR LINES, INC.,  
 BRITISH MIDLAND  
 AIRWAYS LIMITED

for Statements of Authorization and  
 Related Exemptions

Docket OST-2001-10576 - //

**ORDER CONSOLIDATING PROCEEDINGS  
 AND REQUIRING DATA SUBMISSIONS**

By this order, we rule on two motions and invite all interested parties to file comments on the application for approval and antitrust immunity filed by United, bmi, and United's existing European alliance partners (Dockets OST-2001-10575/10576).

On October 31, Northwest filed a motion requesting the consolidation of the American/British Airways (AA/BA) cases (Dockets OST-2001-10387/10388) with the United/bmi cases. By motion filed on November 8, Continental asks us for relief with regard to various data issues in the American/British Airways cases.

We grant Northwest's motion and consolidate the four existing dockets into a single new proceeding, to be called the *U.S.-U.K. Alliance Case*, and we grant Continental's motion in part, deny it in part, and in part dismiss it as moot. We also find that the

record in the United/bmi cases is now substantially complete, but require the submission of some additional information. Comments and reply comments in the consolidated case are now due December 11 and December 18, 2001, respectively.

In the American/British Airways case, we will be considering the airlines' application for approval and antitrust immunity for their proposed alliance. In the United/bmi case, we will be considering their application for approval and antitrust immunity for their alliance, which will also involve United's existing alliance partners, Austrian Airlines, Lufthansa, and SAS, and their affiliates. Both applications, as discussed below, present common issues, since both applications will require us to examine existing and potential levels of competition on routes between the United States and London's two major airports, Heathrow and Gatwick, and the availability of facilities for new or expanded service by U.S. airlines and other competitors at those airports. We find that consolidation will enable us and the parties to address the issues more efficiently and will not delay our decision on either alliance proposal.

#### **I. United/bmi Record**

On September 5, 2001, United Air Lines, Inc. ("United"), British Midland Airways Limited ("bmi"), Austrian Airlines, Österreichische Luftverkehrs AG, Lauda Air Luftfahrt AG, Deutsche Lufthansa, A.G., and Scandinavian Airlines System, and their respective affiliates (collectively, the "Joint Applicants"), filed an application for approval of and antitrust immunity for an Alliance Expansion Agreement between United and bmi, and an Amended Coordination Agreement among the Joint Applicants, together with exhibits. They also filed a related application for the necessary regulatory authorities to conduct blanket reciprocal code-share operations. Each applicant also submitted additional evidentiary material and filed motions under 14 C.F.R. 302.12 (Rule 12) of our regulations requesting confidential treatment for this material. These motions were unopposed.<sup>1</sup>

We have completed our initial review of these applications and find that they are now substantially complete. However, as discussed below, we will require certain redacted and other information to be filed by November 21, and we reserve the right to require the filing of additional information deemed relevant to these proceedings at any time. As part of their submission, the Joint Applicants filed a list of city pairs that would receive first on-line service via London or Manchester as a result of the proposed arrangement.<sup>2</sup> Consistent with our preliminary evidentiary request, we direct the parties to submit this exhibit in electronic form (preferably in Microsoft Excel or

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<sup>1</sup> We will rule on the merits of the Rule 12 Motions by subsequent order. By Notice dated November 6, 2001, we granted immediate interim access to all documents covered by the motions to counsel and outside experts for interested parties, consistent with conditions agreed to by the Joint Applicants and imposed by the Department in similar recent cases.

<sup>2</sup> As set forth in the submission filed by the Joint Applicants on October 18, 2001, and identified in Docket OST-2001-10575 as document number 6 (specifically, see Item 4, Exhibit D).

Microsoft Access 2000® format or earlier).<sup>3</sup> This data shall be submitted to Randall Bennett, the Director of the Office of Aviation Analysis. Accordingly, we require the parties to file this electronic form data no later than November 23, 2001.

## II. Consolidation

### A. Pleadings

**Northwest** argues in its Motion to Consolidate that the applications for antitrust immunity and related code-share authorizations by United/bmi involve much of the same evidence and will require the Department to resolve many of the same material issues as the AA/BA application.<sup>4</sup> Northwest asserts that interested parties must have the opportunity to review United/bmi's confidential documents and assess their significance to issues in the AA/BA proceeding. Northwest further argues that the four joint applicants have conceded that the two proposed alliances are closely related, since each has relied on the other in support of approval for its own alliance. For example, Northwest contends that the Department should not act on either antitrust immunity application until an open skies agreement with the United Kingdom is signed. Further, Northwest argues that due process considerations compel the Department to assess both alliances at the same time.

"Given the unquestionable interrelationship of the applications, a record in either proceeding that does not incorporate and account for material facts and evidence from the other would be necessarily incomplete."<sup>5</sup>

In order to meet due process concerns, Northwest argues that all interested parties must have simultaneous access to the confidential documents submitted by all four joint applicants and be able to use the documents from one proposed alliance in connection with the other. Further, Northwest argues that the fundamental principles of administrative efficiency support the consolidation of the two proceedings.

**Continental** agrees with Northwest's Motion to Consolidate. Continental argues that the Department must consolidate the proceedings, consider all of the issues in common, evaluate the competitive implications of the proposed alliances and use a common record to decide the applications. Continental claims that the Department must follow this course of action or its decision on each application would be defective, since each

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<sup>3</sup> We also direct that the electronic form place origin and destination data in separate fields to facilitate sorting.

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Alternatively, if the Department does not formally consolidate the proceedings, the Department should consider both alliance proposals in one decision and authorize the parties to use the confidential portion of the evidence in each proceeding in presenting arguments in the other proceeding."

Northwest's Motion to Consolidate at 2.

<sup>5</sup> Northwest's Motion to Consolidate at 5.

would be based on a record ignoring the other alliance and its impact on London Heathrow. Further, Continental argues that “both applications . . . assume the existence of the same fundamentally flawed open skies/closed airports agreement.”<sup>6</sup> Continental contends that the Department cannot consider the applications separately because the proposed United/bmi alliance would exacerbate what it asserts are the already overwhelmingly harmful effects of the proposed AA/BA alliance. Continental asserts that the Department and interested parties need the same evidence on the same fundamental issues raised by each set of joint applicants. Therefore, the Department should require AA/BA and United/bmi to respond to the same information requirements, keep them updated as required and allow the evidentiary record on each application to be used in the consolidated proceeding. Continental also argues that if the Department decides not to consolidate the proceedings, then the AA/BA and United/bmi applications should be decided jointly by permitting the parties to address the common issues and information in both proceedings.

**Delta** argues in its Answer in support of the Motion of Northwest that the AA/BA and United/bmi applications for antitrust immunity are inexorably intertwined and should be consolidated. Agreeing further with Northwest, Delta asserts that both applications rely on common evidence, with each of the Joint Applications pointing to the other as a competitive justification for its own approval. Delta argues that “the Department needs to evaluate both alliances at the same time in order to get a fix on what the true overall implications will be for U.S.-Heathrow consumers and would-be competitors.”<sup>7</sup> Delta also argues that the cumulative impacts of the Star and oneworld alliances must be addressed in a single and coordinated proceeding.<sup>8</sup> Although answers to the AA/BA proceeding were filed on November 2, 2001, the Department must allow interested parties to use the new evidence and information received from United/bmi to accurately assess the impacts on the other application and file answers in a consolidated proceeding. Similar to Northwest, Delta argues that neither alliance can proceed until an open skies agreement is reached with the U.S. and the U.K. that guarantees access at Heathrow for non-incumbents to compete with the large combined competitors. Delta claims that inseparable policy and competition issues already effectively join the two applications.

**Virgin Atlantic Airways** answers the Motion of Northwest by arguing that it is essential for the Department to consolidate the AA/BA and United/bmi proceedings since each proceeding involves common questions of law and fact that must be resolved in a simultaneous and consistent manner. Virgin Atlantic contends that the Department

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<sup>6</sup> Answer of Continental at 3.

<sup>7</sup> Answer of Delta at 2.

<sup>8</sup> The Department needs to evaluate how Star’s and oneworld’s possession of a disproportionate share of Heathrow slots may adversely affect global alliance competition by preventing the Heathrow “have not” alliances from offering the level of Heathrow service necessary to attract frequent business travelers and key corporate accounts that demand Heathrow as part of their total travel package.

Answer of Delta at 2-3.

cannot reach separate conclusions on the common material issues that are posed by both proceedings.<sup>9</sup> Virgin Atlantic also argues that the Department cannot assess the full anticompetitive effects of immunizing one of these proposed alliances without considering whether one or two such alliances will be permitted to exist. No interested party will be able to comment fully on the proposed AA/BA and United/bmi alliances until each party is first fully apprised of the details of both alliances by making the information produced in the United/bmi proceeding available to the interested parties.<sup>10</sup> Virgin Atlantic argues that the Department should permit interested parties to amend comments previously filed and add arguments or information raised by, or made available in, the material that United/bmi and other Star Alliance carriers have submitted.

**American Airlines and British Airways** argue that Northwest's Motion is a delaying tactic and makes no compelling case that consolidation or other relief is required.<sup>11</sup> AA/BA claims that the record for the submission of pleadings is closed because replies to Answers were due by November 9, 2001. In contrast, the Department has not yet deemed the United/bmi applications complete. AA/BA also argue that their application is now ripe for a show-cause order, unlike United/bmi, and any consolidation would cause the proceeding to be unduly delayed. According to AA/BA, Northwest has made no credible showing that United/bmi's confidential submissions are necessary to assess the merits of the AA/BA applications. AA/BA argue that the AA/BA dockets include significantly more data and information than in any comparable proceeding.<sup>12</sup> AA/BA contend that Northwest's motion is contrary to applicable precedent in analogous situations. AA/BA argue that "in *American/Canadian Airlines* Order 96-7-21, July 16, 1996, the Department denied various claims that "due process considerations require us to give simultaneous consideration to the

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<sup>9</sup> Material issues include, "whether an open skies agreement has been signed by the United States and the United Kingdom, whether the open skies agreement provides adequate new and expanded access to London airports, . . . whether an immunized American/British Airways alliance would be in a position to exercise monopoly power . . . ; whether immunizing . . . American and British Airways . . . and United, British Midland . . . would promote competition or foster an oligopoly in the U.S.-U.K. and U.S.-Heathrow markets, resulting in less price and service competition.

Answer of Virgin Atlantic at 2-3.

<sup>10</sup> Virgin argues that, "the Department should remedy this problem and give interested parties an opportunity to make more informed comments on the applications of American and British Airways and of United, British Midland, and the other Star Alliance carriers by consolidating the above captioned proceedings and by authorizing the parties to use confidential information taken from any one of the docketed cases in submissions made to the other dockets. " Answer of Virgin Atlantic at 4.

<sup>11</sup> "Indeed, by Order 2001-9-12, September 17, 2001, the Department turned aside earlier arguments that the American Airlines/British Airways and United/British Midland applications be considered together." Joint Answer of American Airlines and British Airways at 3.

<sup>12</sup> "Moreover, if the Department were to accept Northwest's theory that the potential combined effects of the proposed alliances must be evaluated in their totality, then there would be no reason not to consolidate the pending Delta/Air France/Alitalia/Czech Airlines antitrust immunity proceeding (OST-2001-10429) as well." Joint Answer of American Airlines and British Airways at 5.

American/CAI and United/Air Canada [antitrust immunity] applications,” saying “[w]e disagree” (p.13).<sup>13</sup> AA/BA claim that similar to Order 96-7-21, the two cases in the present antitrust proceeding are not mutually exclusive. AA/BA also argue that it is in the public interest to bring their proceeding to a close as expeditiously as possible. Further, AA/BA strongly oppose Northwest’s alternative argument that requests the Department to allow supplemental answers in the AA/BA dockets once the confidential submissions in the United/bmi dockets have been made available to the interested parties. Finally, AA/BA argue that any attempt to consolidate the two antitrust proceedings would result in the U.K. losing its ability to negotiate an open skies agreement with the U.S.

**United Airlines and British Midland** argue that Northwest’s Motion is another delaying tactic implemented to prevent the conclusion of an open skies agreement between the U.S. and the U.K. United/bmi also argue that Northwest failed to provide adequate references to “common issues” arising in both proceedings, which are a basis for consolidation into a single proceeding.<sup>14</sup> Further, United/bmi claim that consolidation is not the appropriate remedy when it results in the delay of the consideration of the two antitrust applications.<sup>15</sup> United/bmi argue that each antitrust immunity case presents unique circumstances and requires a particular analysis, which is why consolidation is inappropriate. Moreover, United/bmi claim that the two antitrust proceedings do not involve a case of mutual exclusivity, which may give rise to a consolidation proceeding in order to assure fair and equal consideration of both applicants. United/bmi urge the Department to decide both antitrust immunity applications on an expedited basis while concluding an open skies agreement with the U.K.<sup>16</sup> United/bmi also argue that Northwest’s proposal for cross-utilization of confidential documents is merely another thinly disguised attempt to accomplish the delay of an open skies agreement.

## B. Decision

We find that the consolidation of the AA/BA and United/bmi cases will improve our ability to analyze and correctly decide the issues presented in each case and will not

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<sup>13</sup> Joint Answer of American Airlines and British Airways at 5.

<sup>14</sup> “The American/BA alliance raises far more controversial competition issues than does the unrelated United/bmi application.” Joint Answer of United Airlines and British Midland at 2.

<sup>15</sup> The Department will consolidate cases only where that action “will be conducive to the proper dispatch of the Department’s business and to the ends of justice and will not unduly delay the proceedings.” Order 91-1-4 at 6, *quoting* 14 CFR §302.12(1990).”

Joint Answer of United Airlines and British Midland at 3.

<sup>16</sup> The procedural schedule should permit the Department, however, to make the antitrust immunity for the United/bmi/Austrian/Lufthansa/SAS enhanced alliance effective immediately upon the effectiveness of the open skies agreement regardless of the effective date of the AA/BA immunity.”

Joint Answer of United Airlines and British Midland at 4.

delay our decision on either alliance proposal. Our ruling on the consolidation motion is thus consistent with our authority under 49 U.S.C. § 46102 to “conduct proceedings in a way conducive to justice and the proper dispatch of business.” Our procedural rules state that we may consolidate proceedings when that “will be conducive to the proper dispatch of [the Department’s] business and to the ends of justice and will not unduly delay the proceedings.”<sup>17</sup>

The AA/BA and United/bmi applications present major common issues, since our decision on each proposal will require us to consider the current state of competition in U.S.-London markets and the impact of each alliance on competition in those markets. Those issues according to several parties will require us to consider the ability of other U.S. airlines to enter Heathrow and to expand service there. As Northwest has pointed out, moreover, AA/BA and United/bmi believe that the potential implementation of the other alliance proposal is relevant to our consideration of their own proposal.<sup>18</sup> AA/BA contend that the existence of the United/bmi alliance is one factor showing that their own alliance will not reduce competition. United/bmi contend, on the other hand, that their alliance is necessary for creating a competitive counterweight to the alliance between AA and BA.<sup>19</sup>

We therefore agree with Northwest, Continental, Delta, and Virgin Atlantic that the issues involved overlap to the degree that simultaneous consideration is warranted; still more important, the resolution of each pair of proceedings is likely to affect the outcome of the other. Consolidation will avoid duplication of resources both for the Department and for the parties, and will permit us to consider the merits and issues together and reach a single, comprehensive decision. Consolidation will allow parties and the Department to address the common issues involved more efficiently and avoid the need otherwise to cross-reference evidence and issues being considered on separate procedural tracks. In addition, consolidation should result in speedier disposition of the various applications than would have been possible on separate procedural tracks.

Consolidating the cases will thus cause no delay in our decision on either alliance proposal. If we were not consolidating the cases, we would still consider them simultaneously. United and its partners themselves, even as they oppose consolidation, urge us “to proceed to a consideration of both alliance applications on an expedited basis.”<sup>20</sup> Our decision here permits us to do just that. Their concern that “the American/BA alliance raises far more controversial competition issues than does the United/bmi application” is thus not determinative—neither case will be delayed, and both should ultimately be further expedited.

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<sup>17</sup> 14 C.F.R. § 302.13 (2001).

<sup>18</sup> See also Answer of Continental at 3; Answer of Delta, at 2.

<sup>19</sup> Motion of Northwest at 4.

<sup>20</sup> Joint Answer of United *et al.*, at 4.



We disagree with the arguments by AA/BA and United/bmi that consolidation would be inconsistent with our rulings in past cases. United errs in its contention that our denial of consolidation in the Heathrow route transfer cases compels denying consolidation here. United cites our order in those cases, in which we noted our criteria for consolidation, but we find that those criteria here strongly militate *toward* consolidation.<sup>21</sup> As shown, consolidating the alliance applications here “will be conducive to the proper dispatch of [the Department’s] business and to the ends of justice and will not unduly delay the proceedings.”<sup>22</sup> These considerations contrast with the circumstances of the route transfer cases. Those cases did involve, as do these, service to Heathrow and consequences for competition. The statutory context is different, however, with different analysis required; the two present alliance cases entail a degree of mutually dependent analysis and decisionmaking absent from the route transfer cases.

American and BA wrongly rely on our refusal to consolidate the antitrust immunity application by United and Air Canada with the previously filed antitrust immunity application filed by American and Canadian. They argue that these applications are comparable to the two cases involving antitrust immunity for U.S. and Canadian carriers: “The *Ashbacker* requirement of contemporaneous consideration of mutually exclusive applications does not govern this proceeding.”<sup>23</sup> This statement is true, in the sense that applications for antitrust immunity are not inherently mutually exclusive. This statement does not mean, however, that we should not consolidate two proceedings where the procedural and analytical circumstances of the proceedings coincide, particularly when the effect of our decision on each alliance proposal is likely to influence our analysis of the other. In these alliance cases, for example, access to London’s Heathrow Airport is indisputably a central issue to both; no single element, necessarily affecting our assessment of the competition issues involved, underlay both Canadian cases to this degree. In addition, the procedural posture of the two Canadian cases was far different from that of the UK cases – United and Air Canada filed their application after we had already issued a show-cause order tentatively granting the application by American and Canadian.

We do not accept the notion that such reasoning also compels consolidation with the Delta/Air France case, as American and BA argue. As a threshold matter, the Delta/Air France case primarily (although not exclusively) involves U.S.-France markets, not U.S.-United Kingdom markets, and access to Heathrow is not a significant issue in the Delta/Air France case. In addition, we have initialed open skies with the French, but not yet with the United Kingdom. Aside from geographic proximity, the cases involve different circumstances.

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<sup>21</sup> Order 91-1-4, issued January 4, 1991. We note that those cases involved procedures governed by Part 302, including section 302.12 (now section 302.13) regarding consolidation, whereas these proceedings are governed by Part 303. We regard section 302.13 as applicable here under Part 303.04(k).

<sup>22</sup> 14 C.F.R. § 302.13 (2001).

<sup>23</sup> Joint Answer of American and BA, at 5, *quoting* Order 96-7-21, July 16, 1996, at 5.

### III. Continental's Motion

#### A. Pleadings

**Continental Airlines** argues that the record in the AA/BA proceeding lacks information that is critical to the evaluation of the proposed alliance and it must be supplemented. Continental also argues:

The Department has recognized that the "impact of recent events may legitimately enter into the evidentiary analysis of the effects of this alliance" (Order 01-10-13 at 2), but failed to enforce requirements in its own regulations that "information provided by the applicants shall be updated in a timely fashion throughout the period of consideration" of an application for approval of agreements and antitrust immunity.<sup>24</sup>

The continuous updating of information by applicants permits the Department to evaluate the applications, and interested parties can prepare responses, based on new realities in aviation. Continental argues that AA/BA must update their applications beginning from August 10, 2001, which is the last time AA/BA submitted pertinent information necessary for a current and accurate analysis of this proceeding.<sup>25</sup>

Continental also argues that AA/BA have redacted critical information from documents they submitted, which is required by the Department.<sup>26</sup> Continental asserts that the indices of AA/BA do not provide information regarding the redacted material, which is required by § 303.04(h) of the Department's regulations.<sup>27</sup> Continental argues that "[w]ithout this vital information, Continental and other interested parties are unable to determine what factors were presented to the American and British Airways boards when they decided to press forward with their proposed alliance and what competitive and other issues were raised by the analyses presented to them."<sup>28</sup> Further, Continental claims that the availability of slots and facilities at London airports is one of the most critical issues in this proceeding. Continental argues that the Joint Applicants are seeking to withhold from public disclosure information on the London airports to be served through U.S. gateways, information for which they have not justified

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<sup>24</sup> Motion of Continental at 2.

<sup>25</sup> "Any decision on the applications of American and British Airways based solely on their exhibits and document submissions prepared prior to September 11 and the record to date would be clearly erroneous." Motion of Continental at 8.

<sup>26</sup> Continental also claims that information on American's documents appears to be missing without any reference to the redaction. *Id.* at 9.

<sup>27</sup> "Unless American and British Airways establish a legal basis for exclusion of such information, Section 303.04(e) of the Department's regulations requires them to submit complete copies of all documents." *Id.* at 13 (public version).

<sup>28</sup> *Id.* at 9.

confidential treatment.<sup>29</sup> Moreover, Continental claims that all interested parties should be allowed to use confidential information in the DOT docketed proceedings before the European Commission and the U.K. Office of Fair Trading. Finally, Continental argues that the Department should allow interested parties to submit supplemental answers regarding the AA/BA antitrust alliance proceeding after the applicants provide the updated requested information to the Department.

**Federal Express** characterizes Continental's motion as "yet another attempt to delay the outcome of this proceeding."<sup>30</sup> Arguing that we have already addressed the issue by inviting parties to address it in answers to the Joint Application, Federal Express claims that we have ruled that the events of September 11 "do not justify a continuing reporting requirement."<sup>31</sup> It also directs us to an appellate court decision to the effect that "agencies may, within their discretion, determine the point at which a final determination may be made in a proceeding."<sup>32</sup> Federal Express believes that we "must look beyond any short-term effects with a clear vision that the achievement of open skies will address most market failures." Accordingly, the carrier urges us to move expeditiously, and, if we require additional data, to set a reasonable date for submission.

**Northwest** supports Continental, in particular supporting permission to share confidential submissions with European competition authorities. In this regard, Northwest argues that the Joint Applicants' waiver could be construed as being limited to material actually included in or referenced by parties' pleadings, rather than all confidential material; accordingly, we should expressly confer the broader permission. Northwest regards European officials as "already subject to the confidentiality rules that govern all participants" by virtue of the Joint Applicants' waiver.

**American and BA** address three of Continental's four requests in their Joint Answer. With respect to the post-September 11 data, they cite the same language in our earlier

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The Department should deny confidential treatment for the response of American and British Airways to Item 6 in Order 2001-9-15, which requires them to disclose any U.S.-London Heathrow route where they plan to switch service from London Gatwick to London Heathrow or otherwise increase service at London Heathrow, including information on the source of the slot. American and British Airways have already waived their request for . . . Item 8, [which] requests the same information about changes in London Heathrow and Gatwick services on routes between London and Europe, Africa and the Middle East. Since the same type of information in Item 8 has been released and since the information in Item 6 and Item 8 concerns all interested parties and is fundamental to any competitive analysis of the proposed American/British Airways alliance because it explains how they will use their London slots, this type of information should not be restricted by the Department's confidentiality procedures any more than the service proposals of applicants in route cases should be confidential.

Continental's Motion at 10-11 (public version).

30 Opposition of Federal Express to Motion of Continental, at 1.

31 *Id.* at 2.

32 *Id.* at 2, quoting *Merritt v. United States*, 960 F.2d 15, 18 (2d Cir. 1992).

order as Federal Express. Believing an “open-ended” reporting requirement to be “unprecedented and unworkable,” they add that we have imposed no such requirement on United, Delta, or their partners.<sup>33</sup> The Joint Applicants also argue that the redactions were of “highly-sensitive documents that were not responsive to the DOT evidence request nor in any way relevant to the DOT’s inquiry.”<sup>34</sup> They claim that Continental’s counsel have had access to the submissions since mid-August, and should have made any complaint long ago. The Joint Applicants regard as “outrageous” Continental’s demand that their route-planning proposals be made public.

## **B. Decision**

Continental seeks four specific determinations from us; we grant its request with respect to the first two, but deny the third. The fourth has effectively been mooted, and we dismiss that portion of the motion accordingly.

We agree that American and BA must update the record, particularly in view of the events of September 11. The rule governing these applications clearly mandates that “[t]he information provided by the applicant shall be updated in a timely fashion throughout the period of consideration of the application.”<sup>35</sup> Since the initial data submission, the industry has seen many changes. Under these circumstances, we see no reason why this reporting requirement should not apply. In the language that both Federal Express and the Joint Applicants cite, we did not profess to absolve the Joint Applicants of the obligation to update the record as appropriate; rather, we noted that the state of the industry and the effects of the September attacks could be addressed by parties in their answers, and did not require a suspension of this proceeding.

We recognize that we have not required the applicants in the Delta/Air France case to update their data. However, their application, unlike the applications in this case, is largely unopposed, and furthermore, we believe that we can decide the issues in the Delta/Air France without updated information.

We also agree that gaps in the evidentiary record, whether identified as “redacted” or simply blank, must be remedied. We direct American and BA to furnish the missing material, covered by a motion for confidential treatment if they wish, by no later than close of business, November 23. We also note that similar redactions exist, if not as pervasively, in the materials submitted by United and its partners; these too must be rectified, in the same timeframe. The rules require that information to be filed with the application.<sup>36</sup>

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<sup>33</sup> Joint Answer of American and BA, at 3, 4.

<sup>34</sup> *Id.* at 4.

<sup>35</sup> 14 C.F.R. § 303.04 (2001).

<sup>36</sup> The submissions from AA/BA and UA/bmi should specifically include the most recent documents regarding the following information that was included in their

We disagree, however, that we must immediately direct American and BA to make public certain material already in the confidential portion of the record. Our foremost concern is that due process be satisfied by the parties having access to this material, and this has been done. Continental has not claimed that it will be unable to present its arguments if the information remains confidential. We do not generally rule on confidentiality motions in a piecemeal fashion, and we see no need to do so here. We will rule on the confidentiality motions by a separate order.

Finally, Continental's request to ensure the availability to European authorities of confidential material in the American/BA proceeding has been mooted by the Joint Applicants' waiver of confidentiality for that purpose.<sup>37</sup> To the degree that, as Northwest argues, the Joint Applicants' waiver is limited, we leave to the European competition authorities the decision as to whether they require additional information. Those authorities have ample power and jurisdiction to seek what data they need; moreover, in contrast to Northwest's view, we have no power to bind those authorities to our confidentiality standards—the confidentiality of material submitted to them is a matter between them and the parties to their proceedings. We therefore dismiss the fourth portion of Continental's motion without reaching the merits.

#### **IV. Further procedures**

To provide all interested parties sufficient time to comment on all material in the public and non-public record in this consolidated proceeding, we will require that answers to the consolidated applications be filed no later than December 11, 2001, and that replies be filed no later than December 18, 2001. We also will deem previous submission of a confidential affidavit in either pair of the predecessor cases as satisfactory to permit access to all such submissions in the new, consolidated case.

Since we will consider all comments and replies submitted thus far in the individual cases along with future pleadings, the parties need not resubmit evidence and arguments that they have already presented. We note that AA/BA filed a reply on

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original application: the parties' current transatlantic schedules (before implementation of the proposed alliances) and any planned (or current draft) transatlantic schedules to be implemented for each of two years after implementation of the proposed alliance (defined as the earliest date at which current alliance service plans are expected to be fully realized). These schedules should include frequency, aircraft type, and number of seats for each operation. In addition, provide a summary based on the foregoing of schedule, frequency, and equipment changes that the parties would expect to make within the first two years of DOT approval of the proposed alliance. These schedules should be submitted in written and electronic form (preferably in Microsoft Excel or Microsoft Access 2000® format or earlier). The electronic form should place origin and destination in separate fields to facilitate sorting.

<sup>37</sup> Joint Statement of American and BA, filed November 14, 2001.

November 9 and made other filings that week that contained a significant amount of new factual and policy analysis. The parties may address that material in the comments due on December 11. We will rule later on Northwest's motions to strike several of those AA/BA submissions.

**ACCORDINGLY,**

1. We grant the Motion of Northwest Airlines to consolidate the captioned proceedings;
2. We consolidate these proceedings into a new case, to be known as the *U.S.-U.K. Alliance Case*, Docket OST-2001-11029;
3. We grant the November 8, 2001 motion of Continental Airlines to the degree set forth in this order;
4. We find that the record in Dockets 10575 and 10576 is substantially complete;
5. We direct all Joint Applicants to submit all materials in accordance with this order by November 23, 2001, in the newly established docket;
6. We direct interested parties to file answers in Docket OST-2001-11029 by December 11, 2001, and any replies by December 18, 2001; and
7. We will not entertain petitions for reconsideration of this order.

By:

**READ C. VAN DE WATER**  
Assistant Secretary  
for Aviation and International Affairs

(SEAL)

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